Supreme Court, U.S.
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No. 01-1608

In the Supreme Court of the United States

HOULIHAN, LOKEY, HOWARD & ZUKIN, INC.,
Petitioner,

v.

THE CIRCLE K CORPORATION, DEBTOR,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Houlihan, Lokey, Howard & Zukin, Inc. incorporates the Corporate Disclosure Statement from its Petition For Writ Of Certiorari.

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REASONS FOR GRANTING THE PETITION

1. Review Is Necessary In Order To Resolve The Split Among The Circuits On An Important Issue Of Federal Law

There is an express split between the Ninth Circuit and the Fifth Circuit on a very important issue of federal law. The Ninth Circuit in the present case held that, for § 328 to govern a professional's fees, the retention application must invoke the section explicitly, and must specify § 328. Pet. App. 7a, 12a-13a. *Donaldson Lufkin & Jenrette Sec. Corp. v. National Gypsum,* 123 F.3d 861 (5th Cir. 1997), on very similar facts, held that the retention was under § 328 because the bankruptcy court there, as here, had pre-approved a flat monthly fee. The Fifth Circuit did not require that § 328 be specified in the application since the initial approval of the terms of engagement made it a § 328 retention. The Ninth Circuit below, reaching the opposite result, recognized this as a conflict and declined to follow the Fifth Circuit's view. Pet. App. 12a. Thus, two circuits have adopted different standards on this issue of federal bankruptcy law.

Respondent asserts that the *National Gypsum* facts are distinguishable and that *National Gypsum* and the decision below are not in conflict on the salient point. On the contrary, the material facts are identical; the two circuits simply applied different tests and came to opposite conclusions. Although not contending that the Ninth Circuit was factually wrong in its reading of *National Gypsum*, or that § 328 was in fact cited in the retention application there, Respondent nonetheless quibbles about whether the Fifth Circuit opinion (as opposed to the record there) contained the

fact that the application did not specify § 328.[1] Opposition at 6-7.

Respondent then recognizes that the Ninth Circuit disagrees with the Fifth Circuit regarding whether the retention application must reference § 328. Opposition at 7-8. Respondent's contention that there is no disagreement on "any real issue" (Opposition at 8) misses the point. The requirement to use the "magic words" or specify § 328 in the application *is* the real point of disagreement.[2]

Respondent claims that the new Ninth Circuit approach is the "majority view," and that it is not in conflict with any other law. Opposition at 8-9. In fact, however, no other circuit court has ruled on this issue.[3] The Third Circuit,

[1] Respondent's claim that the Fifth Circuit did not address whether compensation was to be preapproved (Opposition at 6-7) is wrong. *See National Gypsum*, 123 F.3d at 862-63. Respondent also incorrectly asserts that three applications for interim compensation based on its flat fee, to which no objections were raised, distinguishes *National Gypsum*. Opposition at 7. Similar facts exist in this case, where thirty-three (33) monthly payments of the flat fee amount were made by Respondent without any objection.

[2] Respondent later tacitly acknowledges the division: "The recent Ninth Circuit opinion does not overrule or disagree with any authority within the Ninth Circuit, or indeed, any authority other than that of the Fifth Circuit in *National Gypsum*." Opposition at 12 (emphasis added).

[3] The district court recognized that (prior to the Ninth Circuit decision) there was no circuit court authority requiring that a professional specifically reference § 328 in its initial retention application for that section to apply. Pet. App. 50a-51a. The district court found the retention to be very clear: "It is unclear how much more express and unambiguous the court's order could

in *Zolfo, Cooper & Company v. Sunbeam-Oster Company, Inc.*, 50 F.3d 253 (3rd Cir. 1995), did not address this issue, as Respondent concedes. Opposition at 8-9.[4] There, the only issue on appeal was whether so-called "national" hourly rates listed in a retention application (the retention was on the basis of hourly rates and not a flat rate) limited the bankruptcy court's ability to review the ultimate fees for reasonableness under § 330. *Zolfo, Cooper,* 50 F.3d at 256-257. The Third Circuit held that the bankruptcy court did not err in applying rates which would effectively be lower than "national" rates.

2. The New Test Should Not Be Applied Retroactively.

Respondent denies that the Ninth Circuit created a new "bright-line" test, and claims that "it has always been the law, in the Ninth Circuit and in other circuits, that a professional seeking retention under Section 328 must do so clearly and unambiguously, so as to give other parties notice there will be no further opportunity to review the fee arrangement for reasonableness." Opposition at 11. The decision below holds that the *only* way to satisfy § 328 is to reference that section in the application. Not only is that not the law in other circuits, but prior to this decision it was not the law in the Ninth Circuit. Two prior Ninth Circuit opinions, and one Ninth Circuit Bankruptcy Appellate opinion, did not require specific reference to § 328 in order for that section to apply.

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have been in this case. The bankruptcy judge expressly approved paying Houlihan Lokey $100,000 a month." Pet. App. at 51a.

[4] The Third Circuit's mention of § 328 related to the argument that when a retention application contains a listing of hourly rates, the bankruptcy court's approval of the retention is not advance approval of the hourly rates. *Zolfo, Cooper*, 50 F.3d at 261.

In re Confections By Sandra, Inc., 83 B.R. 729 (9th Cir. B.A.P. 1987), held that where an order authorized the employment of a professional "on the terms and conditions set forth in the application" (which provided for set hourly rates and a set percentage of any recovery received in litigation), the bankruptcy court was limited in its subsequent fee review to the provisions of § 328. *Confections By Sandra*, 83 B.R. at 730-731. There was no requirement that the retention application or order cite to § 328.

Five years later the Ninth Circuit affirmed the rationale of *Confections By Sandra* in *In re Reimers*, 972 F.2d 1127, 1128 (9th Cir. 1992). In *Reimers*, the Ninth Circuit again did not require that a retention application reference § 328 in order for the professional to be entitled to § 328 review. *Reimers*, 972 F.2d at 1128.

Finally, in *In re B.U.M. International, Inc.*, 229 F.3d 824 (9th Cir. 2000), the Ninth Circuit again did not require that a retention application cite § 328 in order for that section to apply. There the court, finding that § 328 did not apply, relied upon the transcript of a pre-retention hearing wherein the bankruptcy judge specifically said that straight reasonableness standards would apply, with possible disgorgement at the end of the case, to which the parties at that hearing agreed. *B.U.M. International,* 229 F.3d at 826. *B.U.M. International* (unlike the case *sub judice*) was not based on the absence of specific reference to either § 328 or § 330. *B.U.M. International*, 229 F.3d at 829.[5]

[5] The Ninth Circuit stated:

> Neither § 328 nor § 330 were specifically referred to when [the financial advisor] submitted its application for employment or when the bankruptcy court ruled on the application. In the

Rather than create a new legal standard or split from the Fifth Circuit, *B.U.M. International* distinguished *National Gypsum* factually, in that the U.S. Trustee and the Unsecured Creditors Committee in *B.U.M. International* objected to the financial advisor's fee arrangements, and the bankruptcy court determined prior to services being rendered that the court would conduct a review based upon "reasonableness and benefit to the estate." *B.U.M. International*, 229 F.3d at 830. In addition, the Ninth Circuit suggested the better future course for bankruptcy courts:

> Although in this case the record clearly indicates that the employment agreement was *not* unconditionally approved under § 328, for future reference, we point out that the better practice would be for a bankruptcy court to accept or reject a proposed employment agreement, not to conditionally accept it

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> order approving the employment, the bankruptcy court specifically included the condition that "all fees and costs of [the financial advisor] are subject to Court approval." We conclude on this record that while the bankruptcy court may have *conditionally* approved [the financial advisor's] employment, it did not convey its complete approval under § 328. To the contrary, it specifically reserved the right to approve the fees. Even if the bankruptcy judge thought that such a reservation was unnecessary to keep the door open for court approval of the fees and costs, he nevertheless specifically and in writing put all interested parties on notice that all of [the financial advisor's] fees were subject to court approval down the road.

B.U.M. International, 229 F.3d at 829 (emphasis in original).

> subject to later review. That way, professionals would know exactly where they stood before undertaking the engagement.

B.U.M. International, 229 F.3d at 830. Unfortunately, the events giving rise to the present case occurred in 1990, and the "future reference" was unavailing. The same reasons that prompted the court in *B.U.M. International* to provide guidance for future reference suggest that the new bright line rule of law announced in this case should not be applied to events more than a decade earlier.

Respondent's assertion that "there is nothing in the Ninth Circuit opinion which suggests that the opinion was based on the mere failure of Houlihan Lokey to recite section 328" (Opposition at 11) is simply wrong. The opinion below stated unambiguously:

> In this Circuit, unless a professional is unambiguously employed pursuant to § 328, its professional fees will be reviewed for reasonableness under § 330. ***To ensure that § 328 governs the review of a professional's fees, a professional must invoke the section explicitly in the retention application.... In this case, Houlihan Lokey failed unambiguously to invoke § 328 in its Retention Application, and the bankruptcy court's Retention Order did not mention § 328 or otherwise make clear that § 328 applied. Therefore, § 330 review was appropriate.***

Pet. App. at 12a-13a (emphasis added).

This case deals with a newly articulated legal standard

in the Ninth Circuit that not only is inconsistent with the test in the Fifth Circuit, but which also declines to follow the Ninth Circuit's prior approach.

Respondent also incorrectly describes the law of prospective application. Opposition at 13-15. Relying upon *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), and *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993), Respondent suggests that pure prospectivity is not an option. Respondent states: "In *James B. Beam,* Justice Souter noted that purely prospective adjudication is wholly unknown and unavailable: . . . ." Opposition at 14. This statement is incorrect. Speaking for the Court in a plurality decision, Justice Souter noted that the purely prospective method has been applied by this Court, albeit infrequently. Justice Souter cited *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), *Buckley v. Valeo*, 424 U.S. 1 (1976), and other cases to this effect. *Beam*, 501 U.S. at 536. Additionally, the quotation upon which Respondent relies for its claim that truly prospective adjudication is "wholly unknown and unavailable" actually relates only to selective prospectivity in the criminal context. Indeed, the Court in *Beam* (a) expressly limited its holding to selective prospectivity, stating that the decision did not "limit the possible applications of the Chevron Oil analysis" (501 U.S. at 543), (b) noted that the grounds for the decision were narrow (*id.* at 544), and (c) expressly declined to "speculate as to the bounds or propriety of pure prospectivity" (*id.*).

Likewise, in *Harper* the Court dealt only with the type of selective prospectivity which had been rejected in *Beam*. As Justice O'Connor noted in dissent in *Harper*, "the question of pure prospectivity is not implicated here." 509 U.S. at 116. Justice O'Connor further stated that "no decision of this

Court forecloses the possibility of pure prospectivity . . ." (*id.* at 115) and the dissent cited to cases which "repeatedly have announced rules of purely prospective effect." *Id. Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), the source of the "quintessentially 'legislat[ive]' prerogative" language quoted on page 15 of the Opposition and at *Harper,* 509 U.S. at 95, dealt with limitations on selective retroactivity in the criminal context and has no application here. *Harper* holds merely that when the Court has applied a case retroactively to the parties before it, then the same rule of law must be applied to all other cases on direct review, even if the Court does not expressly consider retroactivity or prospective application of the decision.

Neither *Beam* nor *Harper* overruled *Chevron*. Thus, subsequent to *Beam* and *Harper*, lower courts have applied *Chevron*. In *Holt v. Shalala*, 35 F.3d 376 (9th Cir. 1994), for example, the Ninth Circuit applied the traditional analysis and determined that the new rule should be applied only prospectively. *Id.* at 380-81. Likewise, in *George v. Camacho*, 119 F.3d 1393, 1399 (9th Cir. 1997), the *Chevron* test was applied to determine whether a new rule of law should be applied prospectively to the parties before the Court. *Camacho* found that if the deciding court applied the rule merely prospectively, it should likewise be applied prospectively to all other cases pending on direct review and presenting the same issue. *Id.* at 1403. *Chevron* has not been overruled, remains good law, and sets forth the standard for deciding cases of pure prospectivity.

CONCLUSION

Petitioner submits that the standard to be applied in determining whether professional fees in bankruptcy matters are governed by § 328 or by § 330 should be the same across

the nation, and that the petition here should be granted in order to establish the proper standard. The new bright line test should not be applied to Petitioner and its 1990 retention.

RESPECTFULLY SUBMITTED,

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